STATE OF SOUTH CAROLINA

BEFORE THE PUBLIC SERVICE COMMISSION

DOCKET NO. 2017-351-E

IN RE:	)	
	)	
Newberry Solar I, LLC,	)	
	)	
Complainant,	)	REPLY TO OBJECTIONS
	)	OF NEWBERRY SOLAR I,
v.	)	LLC AND DUKE ENERGY
	)	CAROLINAS, LLC
Duke Energy Carolinas, LLC,	)	
	)	
Defendant.	)	
	)	

Birdseye Renewable Energy, LLC ("Birdseye") hereby Returns to the January 22, 2018 Return to Petition to Intervene of Newberry Solar I, LLC ("Newberry") (the "Newberry Return"), and the January 22, 2018 Duke Energy Carolinas, LLC's ("Duke") Objection to Birdseye Renewable Energy, LLC's Petition to Intervene ("Duke Return") (collectively, "the Returns"), pursuant to R. 103-829(A) of the Public Service Commission of South Carolina's ("Commission") rules. As described further herein, the Returns overlook key facts, are not supported in law or equity, and fail to recognize the harm that would be caused to Birdseye if its January 11, 2018 Petition to Intervene in the above-captioned proceeding ("Petition to Intervene") is denied and if the above-captioned proceeding is terminated at this juncture. Accordingly, Birdseye requests that: 1) the Commission reject the arguments raised in the Returns and grant Birdseye's Petition to Intervene, and 2) grant Birdseye until February 14, 2018 to gather additional information on the queue dispute, attempt to resolve this matter with the other parties, and report back to the Commission.

BACKGROUND

While Birdseye generally agrees with the factual background of this proceeding as described in the Returns,[1] the Returns leave out key facts that are important for the Commission to consider when deciding whether to grant the Petition to Intervene. Most notably, as further described in the Petition to Intervene, Birdseye was not informed by Duke until January 10, 2018 that the system impact study for one of its solar projects would need to be redone.[2] While the totality of the circumstances and facts that prompted Duke to claim that Duke now needs to redo the system impact study were not (and are still not) known to Birdseye at the time it filed the Petition to Intervene, Birdseye knew it would be irrevocably harmed by a quick settlement in the above-captioned proceeding that resulted in Newberry's queue position being reassigned ahead of Birdseye's solar project. This was because that in addition to delaying the ultimate interconnection of Birdseye's solar project, Birdseye's solar project could be potentially assigned *tens of millions of dollars'* worth of upgrade costs that Birdseye had not previously been assigned or aware of - despite the fact that Birdseye's solar project had been in Duke's interconnection queue *for nearly two years*.[3] From its first interaction with Duke, which preceded the submission of Birdseye's initial interconnection applications for its solar projects, Birdseye took great care and invested significant design resources to minimize upgrade costs and timing while also enhancing the competitiveness of its projects. Adding upgrade costs or delaying the timing of interconnection at this time will reduce the competitive position of Birdseye's solar projects and may impair their economics. Had Duke advised Birdseye of these potential upgrade costs in a timely and reasonable

[1] *See* Newberry Reply at 1-2; Duke Reply at 1-2.

[2] *See* Petition to Intervene at P 4.

[3] Birdseye recently became aware that another of its solar projects may face additional allocation of upgrade costs as a result of the reassignment of Newberry's queue position.

manner, Birdseye would have likely invested less time, resources and money into developing the solar projects, and would have pursued different project development opportunities.

Accordingly, on January 10, 2018- the same day that Birdseye was made aware of the issues in the above-captioned proceeding – Birdseye's counsel notified Duke's counsel via email (attached hereto as Attachment A), with a copy to Newberry's counsel, of 1) its interests in the above-captioned proceeding; 2) its intention to file the Petition to Intervene; 3) that any settlement in the above-captioned proceeding at this juncture would have adverse financial impacts on Birdseye; and 4) requested that Duke pause any further action in the above-captioned proceeding until Birdseye filed its Petition to Intervene. Rather than agree to Birdseye's reasonable request, on January 11, 2018, Newberry instead immediately filed a letter with the Commission stating that Newberry and Duke had settled their issues at issue in the above-captioned proceeding, and requested that the above-captioned proceeding be closed with prejudice (the "Newberry Letter"). Newberry and Duke now seek to prevent Birdseye from intervening in the above-captioned proceeding despite the fact that such settlement will likely result in irrevocable financial harm to Birdseye.

ARGUMENT

Duke and Newberry make several arguments as to why the Petition to Intervene should be denied by the Commission, but their arguments fail for several reasons.

1. *It Is Inequitable To Deny The Petition To Intervene Given The Timing of the Newberry Letter*

Both Newberry and Duke argue that once Newberry notified the Commission on January 11, 2018 that it had settled its dispute with Duke that there was no "contested case" under S.C. Code Ann. § 1-23-320(F), and therefore the Petition to Intervene should be dismissed.[4] However,

[4] *See* Newberry Reply at 3; Duke Reply at 2.

this argument is overly simplistic and results in an inequitable, unfair and unjust outcome for Birdseye. Importantly, as noted in the Newberry return, a "contested case" is "a proceeding including but not restricted to, ratemaking, price fixing, and licensing, in which legal rights, duties, or privileges of *a party* are required by law to be determined by an agency after an *opportunity for hearing*."[5]

As discussed previously, Newberry and Duke were well aware of Birdseye's interest in the above-captioned proceeding when the Newberry Letter was filed. In fact, the timing of the filing of this letter – one day after Newberry and Duke received notice of Birdseye's interests in the above-captioned proceeding- suggests that Newberry and Duke rushed to the Commission in order to attempt to prevent Birdseye from intervening in the above-captioned proceeding because they knew that any settlement between Newberry and Duke would adversely impact Birdseye and would be contested by Birdseye. Even if this was not in fact their intent, the effect of their actions would prevent Birdseye from becoming a party in the above-captioned proceeding, and would deny Birdseye an opportunity to have a fair opportunity for hearing before the Commission on issues that will materially impact it. Accordingly, the Commission should not interpret S.C. Code Ann. § 1-23-320(F) as Newberry and Duke have under circumstances in which the actions of two parties to a proceeding *are preventing* a third-party from becoming a formal party to such proceeding. Moreover, from a strictly equitable standpoint, Birdseye should be allowed to intervene in the above-captioned proceeding. Denying the Petition to Intervene would prohibit Birdseye from exercising its rights in the above-captioned proceeding, and such denial would cause Birdseye potentially tens of millions of dollars' worth of harm. Additionally, as described

[5] Newberry Reply at 2 (quoting S.C. Code Ann. § 1-23-310 (3) (emphasis added)).

in further detail below, granting the Petition to Intervene and adopting Birdseye's proposed path forward will not result in any adverse outcomes for Newberry or Duke.

2. *The Petition To Intervene Should Be Granted As a Matter of Law*

In addition to the fact it would be inequitable to deny Birdseye's Petition to Intervene, the Petition to Intervene should be granted as a matter of law, as indicated by, *inter alia*, the very case precedent that Duke cites to support its position.

First, Newberry and Duke take the untenable position that this proceeding ceased to be a "contested case" *the instant* that the Newberry Letter was filed.[6] In addition to the fact that the timing of the Newberry Letter seemed geared towards preventing Birdseye from becoming a party in the above-captioned proceeding, Newberry and Duke completely overlook the fact that both the Newberry Letter and the Petition to Intervene were filed *on the same day*. It is simply illogical to argue that the mere fact that two parties have reached a settlement agreement on matters related to an open Commission proceeding necessarily forecloses a third-party from intervening in such proceeding, particularly when, as here: 1) the Commission has not yet issued an order closing such proceeding; 2) the third party notified the settling parties of its interests in the underlying proceeding prior to the settling parties notifying the Commission that their settlement was memorialized in writing; 3) the third party notified the settling parties of their intention to intervene in the underlying proceeding prior to the settling parties notifying the Commission that their settlement was memorialized in writing; and 4) the third party filed a Petition to Intervene the same day that the settling parties notified the Commission that their settlement was memorialized in writing. Nonetheless, this is the position that Newberry and Duke now take.

[6] *See* Newberry Reply at 3; Duke Reply at 2.

Moreover, the very case that Duke cites to support its position, *Dep't of Health & Envtl. Control v. Columbia Organic Chem. Co. (ex Parte Reichlyn)*, 310 S.C. 495, 427 S.E.2d 661 (1993) ("*ex Parte Reichlyn*"),[7] actually undercuts it. In *ex Parte Reichlyn*, a third party (Reichlyn) attempted to intervene in an environmental enforcement action to execute a judgement against a party *after* the parties entered into a consent order to remedy hazardous environmental conditions. Importantly, this consent order was between a private actor and a governmental entity, specifically the South Carolina Department of Health and Environmental Control. The fact the intervention occurred after the consent order had been entered into was the court's basis for holding that there was "no ongoing judicial 'action' into which Reichlyn can intervene."[8] Here, no such consent order has been entered into, nor has the Commission approved the settlement between Newberry and Duke or issued an order terminating the above-captioned proceeding. Instead, two private parties whose settlement will cause harm to a third-party private entity have merely notified the Commission that that they have settled a matter between them, which has not in fact terminated the "judicial action" before the Commission, particularly in light of the fact that such notification was received the same day that the aggrieved party (Birdseye) filed a Petition to Intervene in the still-open proceeding.

Further, *ex Parte Reichlyn* specifies the factors that the Commission should consider when determining whether a motion to intervene is timely under Rule 24 of the South Carolina Rules of Civil Procedure:

> 1) the time that has passed since the applicant knew or should have known of his or her interest in the suit; 2) the reason for the delay; 3) the stage to which the

[7] *See* Duke Reply at 2.

[8] *See ex Parte Reichlyn*, 310 S.C. at 500.

> litigation has progressed; and 4) the prejudice the original parties would suffer from granting intervention and the applicant would suffer from denying intervention.[9]

Applying these factors to the facts at hand, it is clear that the Commission should grant Birdseye's Petition to Intervene. With regard to the first factor, because Birdseye was not initially a party to the above-captioned proceeding, it did not receive any formal notice of the issues being discussed herein, and was only notified of the queue issue via Duke's email on January 10, 2018. With regard to the second factor, Birdseye notified Newberry and Duke of its interests the same day it found out that its interests were implicated, and filed its Notice of Petition the following day, meaning there was virtually no delay between the time Birdseye first learned of its interests being implicated in the above-captioned proceeding and the filing of its Petition to Intervene.[10]

With regard to the third factor, this Commission proceeding is still at a relatively early stage. Finally, with regard to the fourth factor, as further described below, Birdseye requests that the Commission refrain from taking any action in this proceeding for a three week period so that Birdseye may work with Newberry and Duke in order to understand technical and procedural details related to its solar projects' queue positions and Newberry's queue position. This information will enable Birdseye to fully understand the ramifications of Newberry's queue position being reassigned, and will allow Birdseye to attempt to work towards resolving this situation in a manner that is agreeable to all parties. This requested modest extension of time, and the fact that no harm would be caused to Newberry and Duke by such extension, is vastly outweighed by the potential for tens of millions of dollars of upgrade costs being impermissibly

[9] *Id.* at 500 (citing *Davis v. Jennings,* 304 S.C. 502, 504, 405 S.E.2d 601, 603 (1991).

[10] Notably, the one-day difference between January 10 and January 11, 2018 was attributable to time necessary to draft the Petition to Intervene.

allocated to Birdseye if Birdseye is unable to intervene in the above-captioned proceeding. Accordingly, Birdseye's Petition to Intervene should be granted by the Commission.

3. *Birdseye's Proposed Path Forward*

As discussed, Birdseye proposes that the Commission grant its Petition to Intervene, and that the Commission refrain from taking any further action in this proceeding for a period of three weeks (until February 14, 2018). During this time, Birdseye proposes that Birdseye, Newberry and Duke work together to attempt to resolve any outstanding issues between them, and report back to the Commission by February 14, 2018. Birdseye, Newberry and Duke have had several informative conversations to date, and Birdseye looks forward to continue working with Newberry and Duke so that it may fully understand why Newberry's queue position was reassigned approximately two years after Birdseye began the interconnection process with Duke for two of its solar projects. As of the filing of this Reply, however, Birdseye is still missing several important pieces of information related to Duke's administration of its federal and Commission-jurisdictional interconnection queues. Moreover, Birdseye has reason to believe that it may have valid causes of action against Duke and possibly Newberry that are within the Commission's jurisdiction, although Birdseye still needs to obtain additional facts regarding those claims. Accordingly, it is premature for Duke to assert that "Birdseye's interest in this proceeding involves matters exclusive to the jurisdiction of the Federal Energy Regulatory Commission ('FERC')."[11]

Given the fact that Birdseye is still in a fact-gathering mode related to the reassignment of Newberry's queue position and the impact that reassignment has on Birdseye, it is Birdseye's strong preference to work constructively with Newberry and Duke to understand such pertinent facts and circumstances. However, should the Commission reject the Petition to Intervene, and

[11] *See* Duke Reply at 3.

should Newberry's queue position be reassigned without further explanation to Birdseye from Duke, Birdseye will have little choice but to pursue other legal remedies before the Commission and other appropriate venues. Rather spend valuable Commission resources on commencing a separate proceeding, however, Birdseye would prefer that its Petition to Intervene be granted, and that Birdseye, Newberry and Duke work together, with Commission guidance and assistance as necessary, to resolve their issues in an amicable fashion.

CONCLUSION

For the foregoing reasons, Birdseye requests that the Commission consider this Reply to Answers, and grant Birdseye's Petition to Intervene.

Respectfully submitted this 24th day of January, 2018

NELSON MULLINS RILEY & SCARBOROUGH, LLP

By: 

Weston Adams (SC Bar No. 64291)
weston.adams@nelsonmullins.com
Jeremy C. Hodges (SC Bar No. 71123)
jeremy.hodges@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211)
Columbia, SC 29201
(803) 799-2000

Attorneys for Petitioner, Birdseye Renewable Energy, LLC

EXHIBIT A

From: Weston Adams
Sent: Wednesday, January 10, 2018 5:03 PM
To: 'Lewter, Scott' <Scott.Lewter@duke-energy.com>; Bednar,Brian C. -birdseyeenergy <bbednar@birdseyeenergy.com>
Cc: lrogers@birdseyeenergy.com; Harris, Peden-birdseyeenergy <pharris@birdseyeenergy.com>; Larry Ostema <larry.ostema@nelsonmullins.com>; Dulin, Rebecca Jean <Rebecca.Dulin@duke-energy.com>; 'Frank R. Ellerbe III' <fellerbe@sowellgray.com>; 'RLWhitt@AustinRogersPA.com' <RLWhitt@AustinRogersPA.com>; 'jpittman@regstaff.sc.gov' <jpittman@regstaff.sc.gov>; Steven Shparber <steven.shparber@nelsonmullins.com>
Subject: RE: Angus project update

Rebecca and Frank:
Our client Birdseye disagrees with Duke's below decision as to Birdseye. In a related matter, note also that Birdseye intends to file a Petition to Intervene in SCPSC Docket #2017-351-E, and/or a separate SCPSC Complaint as well on the below issue. Duke's below legally invalid action, and its related invalid actions in regards to a settlement agreement in SCPSC Docket #2017-351-E, have significant adverse financial impacts on my client, and my client has had not been allowed to have any input in either of these Duke decisions. As such, our client requests that Duke pause any further action on either the below issue, or on the proposed settlement agreement in SCPSC Docket #2017-351-E, until Birdseye can file its Petition to Intervene and/or its separate SCPSC Complaint.
I conveyed this same message to Frank today in my call to him.
Thank you for your assistance.
Best regards,
Weston Adams, III

STATE OF SOUTH CAROLINA

BEFORE THE PUBLIC SERVICE COMMISSION

DOCKET NO. 2017-351-E

IN RE:	)	
	)	
Newberry Solar I, LLC,	)	
	)	
Complainant,	)	CERTIFICATE OF SERVICE
	)	
v.	)	
	)	
Duke Energy Carolinas, LLC,	)	
	)	
Defendant.	)	
	)	

I hereby certify that on January 11, 2018, I served a copy of the *Reply to Objections of Newberry Solar I, LLC and Duke Energy Carolinas, LLC* by electronic mail to the following:

Jenny Pittman
jpittman@regstaff.gov
Office of Regulatory Staff
Post Office Box 11263
Columbia, SC 29211

Frank R. Ellerbe, III
fellerbe@sowellgray.com
Sowell Gray Robinson Stepp Laffitte, LLC
Post Office Box 11449
Columbia, SC 29211

Heather S. Smith
Heather.smith@duke-energy.com
Duke Energy Carolinas, LLS
40 W. Broad Street, Suite 690
Greenville, SC 29601

Rebecca J. Dulin
Rebecca.dulin@duke-energy.com
Duke Energy Carolinas, LLC
1201 Main Street, Suite 1180
Columbia, SC 29201

Scott Elliott
selliott@elliottlw.us
Elliott & Elliott, P.A.
1508 Lady Street
Columbia, SC 29201

s/ Jeremy C. Hodges

Columbia, South Carolina
January 24, 2018